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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 ROBERT HENRY,

11 Petitioner,

No. CIV S-94-0916 JKS EFB P

12 vs.

13 CHARLES D. MARSHALL,

14 Respondent.

ORDER

15 _____/
16 Petitioner is a state prisoner seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254. An
17 evidentiary hearing in petitioner's action is scheduled to commence at 9:30 a.m. on April 20,
18 2009.

19 On April 1, 2009, a subpoena was personally served on Mary Gardner, commanding her
20 to appear at the April 20 evidentiary hearing. Also on April 1, 2009, Ms. Gardner wrote a letter
21 to the assigned magistrate judge, requesting "to be dismiss[ed] from th[e] subpoena" because she
22 does not remember petitioner or anything about his case and because it would be a hardship on
23 her "to get to Sacramento at that time of day." The letter was filed on April 6, 2009. The court
24 will construe Ms. Gardner's letter as a motion to quash the subpoena based on undue burden.
25 *See* Fed. R. Civ. P. 45(c)(3)(A)(iv).

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1 Although the court understands that Ms. Gardner's appearance at the evidentiary hearing
2 may be inconvenient and burdensome for her,¹ because it is unclear what evidence petitioner
3 seeks to elicit from her at the hearing and because of the magnitude of the issues at stake in this
4 action, the court cannot say that the burden is "undue" or that "the burden of the [subpoena]
5 outweighs its likely benefit, considering the needs of the case, . . . the importance of the issues at
6 stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P.
7 45(c)(3)(A)(iv), 26(b)(2)(C)(iii). Therefore, the motion to quash the subpoena is denied.
8 However, prior to calling Ms. Gardner to testify at the evidentiary hearing, petitioner will be
9 required to make a proffer regarding Ms. Gardner's testimony. If it becomes clear that Ms.
10 Gardner's testimony would be irrelevant to the issues in the evidentiary hearing or would be
11 otherwise inadmissible, she will not be required to testify at the hearing.

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Mary Gardner's motion to quash the subpoena is denied;
14 2. The Clerk of the Court is directed to forward a copy of this order to the United States
15 Marshal; and
16 3. As soon as possible after receipt of this order from the Clerk of the Court, but no later
17 than April 17, 2009, the United States Marshal shall serve a copy of this order on Mary Gardner
18 at 1000 Gateway Drive, Vallejo, California 94589.

19 DATED: April 15, 2009.

20 
21 EDMUND F. BRENNAN
22 UNITED STATES MAGISTRATE JUDGE
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26 ¹ Ms. Gardner is reminded that after she attends the evidentiary hearing, she will be
compensated for her mileage and paid a daily witness fee.